

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANGELO DEL SIGNORE	:	
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1993 and for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1991 through February 28, 1995.	:	DETERMINATION DTA NO. 818157

Petitioner, Angelo Del Signore, 914 Pierce Avenue, Bronx, New York 10462, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1993 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1991 through February 28, 1995.

On July 10, 2002, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioner's response was due by September 10, 2002 which started the 90-day period for issuing this determination. The Division of Taxation appeared by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel). Petitioner appeared by S. Buxbaum and Company, P.C. (Stewart Buxbaum, CPA). Based upon the pleadings and motion papers, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because petitioner failed to file a petition or request for conciliation conference within 90 days of the issuance of the notices of deficiency and determination.

FINDINGS OF FACT

1. On November 17, 2000, the Division of Tax Appeals received a petition challenging notices which asserted deficiencies of personal income tax and assessed deficiencies of sales and use tax.

2. In response to the petition, the Division of Taxation (“Division”) filed a Motion for Summary Determination on the grounds that petitioner failed to file a request for a conciliation conference or file a petition for a hearing within 90 days of the issuance of the notices of determination or notices of deficiency. In support of the motion, the Division submitted, among other things, an affidavit from Geraldine Mahon which attests to the regular procedures followed by the Case and Resource Tracking System (“CARTS”) with respect to the processing of statutory notices prior to their shipment to the Division’s Mechanical Section for mailing.

3. As part of Ms. Mahon’s regular duties, she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the “certified mail record.” Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

4. The certified mail record pertaining to the mailing at issue consisted of 27 fan-folded (connected) pages and included the notices issued to Angelo Del Signore on November 17, 1995. The certified mail record has all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by

Ms. Mahon. The certified control numbers run consecutively and there are 11 entries on each page with the exception of page 27 which contains 10 entries. Portions of the certified mail record have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

5. In the upper left hand corner of the first page of the certified mail record the date November 8, 1995 was manually changed to November 17, 1995. The original date of November 8, 1995 was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from November 8, 1995 to November 17, 1995 was made by personnel in the Division's Mail Processing Center. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered to the U.S. Postal Service.

6. Each statutory notice is placed in an envelope by Division personnel and delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this instance, a Postal Service representative initialed page 27 of the certified mail record, wrote the total number of pieces received at the post office on the same page and affixed a postmark to each page of the certified mail record. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail. The procedures followed and described are the normal and regular procedures of the CARTS control unit.

7. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered the certified mail record and a copy of each of the notices. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled “NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR PRESORT QUALIFIED MAIL.” The upper right-hand corners of the pages are consecutively numbered from page 1 to page 27. The upper left-hand corner of each page contains the printed date of “11/08/95.” On the first page, this date was crossed out and a new date of “11-17-95” was written above the original printed date. Each of the pages contains columns labeled “Certified No.,” “Notice number,” “Name of Addressee, Street and P.O. Address,” “Postage,” “Fee” and “RR Fee.” Certified numbers are listed in a vertical column on the left side of each page. Pages six and seven contain entries which set forth petitioner's name and address, notice numbers L 011383103¹ through L 011383109 and L 011383113 using control numbers P 911 171 357 through P 911 171 363 and P 911 171 367. The notice numbers correspond with the ones found on the notices which are attached to the affidavit of Ms. Mahon. On page 27, the “total pieces and amounts listed” is stated to be 296. Also, the number 296 is handwritten and initialed adjacent to the line for “total pieces received at post office.” In addition, the total fee of \$325.60 is consistent with the mailing of 296 pieces of mail at a fee of \$1.10 per item. A date stamp appears on each page of the certified mail record which accompanied the affidavit of Geraldine Mahon. With the exception of pages 6, 7 and 18,

¹ Assessments L-011383103 and L-011744209 were not protested but were listed on the Consolidated Statement of Tax Liabilities attached to the petition. These assessments were paid in full. Although assessment L-011383103 is not in issue, it was mentioned above because it is part of a series of notices which were mailed at the same time.

the stamp is sufficiently legible to determine that it bears the date of "November 17, 1995" and was from the Colonie Center Branch of the United States Postal Service. Although it is clear that a stamp was placed on pages six and seven of the certified mail record, portions of the stamp are not legible.

8. As exhibits, the Division offered copies of the notices which were dated November 17, 1995. The first notice was a Notice of Estimated Determination which listed assessment number L-011383103-3 and assessed sales and use tax in the amount of \$16,266.46. The Division then offered six notices of determination which assessed sales and use tax as follows: assessment number L-011383104-2 in the amount of \$2,276.31, assessment number L-011383105-1 in the amount of \$3,003.25, assessment number L-011383106-9 in the amount of \$2,009.05, assessment number L-011383107-8 in the amount of \$13,199.36, assessment number L-011383108-7 in the amount of \$15,788.54, and assessment number L-011383109-6 in the amount of \$13,941.92. Lastly, the Division offered a Notice of Deficiency which asserted a deficiency of withholding tax, in the amount of \$333.40 (assessment number L-011383113-3).

9. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for outgoing certified mail. A certified mail record is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine, which places each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the certified

mail record against the information contained on the certified mail record. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the certified mail record by checking those envelopes against the information contained on the certified mail record.

10. A member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the certified mail record indicating receipt of the mail listed on the certified mail record and of the certified mail record itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the certified mail record is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the certified mail record. On the following day, the certified mail record is picked up at the USPS by a member of the Mail Processing Center staff, whereupon it is delivered to the Carts Control Unit. The certified mail record retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The foregoing procedures were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and these procedures were followed on November 17, 1995.

11. The Division also presented a set of documents with respect to the mailing of a Notice of Determination, assessment number L-011380231, on November 20, 1995. However, after the motion was filed, petitioner's representative advised the Division of Tax Appeals that this notice

was canceled by the Audit Division. Thereafter, the Audit Division confirmed that the notice had been canceled and was not in issue.

12. Angelo and Antonina Del Signore filed a New York State personal income tax return for the year 1994 which stated that petitioner's address was 914 Pierce Avenue, Bronx, New York 10462-4007. This is the same address which appears on the notices and certified mail record of November 17, 1995.

13. The petition of Mr. Del Signore was received by the Division of Tax Appeals on November 17, 2000. The postmark on the envelope used to mail the petition is illegible. Among other things, the petition stated that the 90-day period to protest a notice did not begin because the taxpayer never received a copy of the notice of determination. It was asserted that he became aware of the liability through collection proceedings.

SUMMARY OF PETITIONER'S POSITION

14. In response to the motion for summary determination, petitioner first argues that Mrs. Mahon could not possibly know which notices were actually mailed because the certified mail log for November 17, 1995 may list documents that were supposed to be mailed but were, in fact, not mailed. Further, there are no initials on pages six or seven where the notices issued to Angelo Del Signore are listed in order to substantiate the mailing or determine whether certain notices were pulled for corrections. According to petitioner, the only indication of mailing is the number 296 on page 27 and two initials which were not written with sufficient clarity to determine what the initials are. It is further asserted that the stamp on pages six and seven of the November 17, 1995 certified mail record, which does not identify the post office or the purported postal employee's initials or the date, does not rise to the level of proof to show actual mailing. According to petitioner, the substantiation of mailing of a particular document to a certain

person on a specific date is not provided by the affidavit of Mrs. Mahon which concerns general procedures.

15. Petitioner further contends that the affidavit of Mr. Baisley is deficient because he cannot attest that a procedure that occurred more than six years ago actually occurred as opposed to what he thought would have actually happened. It is further submitted that it is unclear that pages six and seven were stamped by the United States Postal Service. In addition, petitioner posits that it is uncertain whether the letters on page 27 are a postal employee's initials or someone else's. After comparing the mailing affidavits in *Matter of McNamara* (Tax Appeals Tribunal, January 30, 1997) with the one in this matter, petitioner argues that the standard procedure is vague with regard to confirmations obtained from the post office. In this regard, petitioner asks whether a signature is required or whether initials are sufficient.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, *shall recite all the material facts and show that there is no material issue of fact*, and that the facts mandate a determination in the moving party's favor. The *motion shall be granted if*, upon all the papers and proof submitted, *the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented* and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (emphasis added).

B. Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as

a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr*, 64 NY2d 851, 487 NYS2d 316, 317, *citing* *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

C. Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

D. A petition contesting the notices at issue herein must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]; § 1138[a][1]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a notice of determination (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

E. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the notice (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. The affidavits of two Division employees, Geraldine Mahon and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices like the ones mailed to petitioner. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the notices and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and Baisley affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and address appear on pages six and seven of the certified mail record which bears a USPS date stamp of November 17, 1995. There are 296 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated that he received 296 items for mailing. In short, the Division established that it mailed the notices in issue to petitioner by certified mail on November 17, 1995.

G. Petitioner's first argument is that the affidavits of Mrs. Mahon and Mr. Baisley are deficient because they do not establish that the notices in issue were actually mailed to petitioner. By making this argument, petitioner, in effect, contends that only affidavits by one with personal knowledge of the mailing are sufficient to establish mailing. This argument is rejected. The Tax Appeals Tribunal has noted that "[t]here is no requirement to produce employees with personal knowledge of the mailing of each individual notice of determination." (*Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997.) In order to succeed, petitioner must present evidence showing that the mailing did not occur as claimed by the Division or that the Division did not follow its mailing procedures (*see, Matter of Kushner*, Tax Appeals Tribunal, June 27, 2002; *Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999). No evidence has been offered to meet this burden.

H. Petitioner argues that the Division's proof is deficient because pages six and seven of the certified mail log of November 17, 1995 lack initials or a legible postal stamp to substantiate the mailing. It is contended that the postal stamp on pages six and seven is deficient because it does not identify the post office, the postal employee or the date.

I. The Tax Appeals Tribunal has held that an illegible postmark may result in a finding in favor of petitioner on the issue of timeliness (*see, Matter of Auto Parts Center, Inc.*, Tax Appeals Tribunal, February 9, 1995). In this case however, the flaw is outweighed by other considerations. Although portions of the stamp on pages six and seven are not legible, it is clear that a stamp was placed on each page of the certified mail record and, with the exception of one other page, the stamp is legible. Further, the record shows that at the time the certified mail record was brought to the post office, all of the pages were connected and they remained connected when the document was returned to the Division. Under these circumstances, the only reasonable inference to draw is that the same stamp was used on each page of the mail record and that the stamp was placed on each of the pages of the mail record at the same place and time. Therefore, it is concluded that the mailing record is not fatally flawed (*see, Matter of Jain*, Tax Appeals Tribunal, August 1, 1996, **confirmed** __ AD2d __, January 31, 1997, **lv denied** 89 NY2d 815, 659 NYS2d 856).

J. Petitioner's argument that the proof of mailing is insufficient because it is unclear whose initials appear on the last page of the mailing log is similarly without merit. The standard practice is for a Postal Service representative to affix his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. Therefore, it is reasonable to conclude that the initials belong to an employee of the Postal Service. There is no requirement

that the Division be able to identify the person whose initials appear on the certified mail record (*see, Matter of Kushner*, Tax Appeals Tribunal, June 27, 2002).

K. Lastly, petitioner's contention that there is a conflict between the alleged standard practice set forth in *Matter of McNamara* (Tax Appeals Tribunal, January 30, 1997) and that presented here is also rejected. In *Matter of McNamara*, Ms. Mahon averred that the U.S. Service Postal "affixes his or her initials/signature and/or a U.S. Postal Service Postmark to a page or pages of the certified mail record." In this case, she made exactly the same allegation. However, in *Matter of McNamara (supra)*, Mr. LaFar stated:

The postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service. The postal employee also circles the total number of pieces listed to indicate that this was the total number of pieces received at the post office. After the certified mail record has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here, CARTS Control Unit).

L. Petitioner is correct that there is a slight discrepancy between the affidavit of Mr. LaFar and that of Ms. Mahon regarding whether the standard practice is for a signature or initials to be placed on the certified mail record. However, the difference is insignificant. The point is that it is a standard practice for a postal employee to indicate by his or her initials or signature or stamp that the Postal Service received the indicated number of pieces of mail. Here, the standard practice was followed and, therefore, this argument is also rejected.

M. The question remains whether petitioner Angelo Del Signore timely filed his request for a hearing. Pursuant to Tax Law § 689[b] and § 1138[a][1], he had 90 days from the mailing of the notices to file a request for a hearing. In this instance, the postmark on the copy of the envelope which contained the petition is illegible. When the postmark is illegible, the burden is on the party required to file the document to prove the date of the postmark (20 NYCRR

3000.22[a][2][iii]). In this case, the Division established that the notices in issue were mailed on November 17, 1995 and that the petition was received by the Division of Tax Appeals on November 17, 2000. In response, petitioner has not offered any evidence to prove that the envelope bore a timely postmark. Therefore, it is concluded that the petition was untimely.

N. The motion of the Division of Taxation for summary determination is granted and the petition of Angelo Del Signore is dismissed with respect to assessments numbered L-011383104-2; L-011383105-1; L-011383106-9; L-011383107-8; L-011383108-7; L-011383109-6; and L-011383113-3. No determination is rendered with respect to the Division of Taxation's motion for summary determination regarding notice number L-011380231 because the issues raised by the motion are moot.

DATED: Troy, New York
November 27, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE